Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1942 (2)

In The

Supreme Court of the United States

October Term, 1984

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

HENRY GERRARD CLAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

This supplemental brief is presented pursuant to Rule 22.6 in order to bring to the attention of this Court information concerning the status of an unreported case not known to the respondent Henry Gerrard Clay (hereafter Clay) at the time of the filing of his Response in Opposition to the Petition for Writ of Certiorari of Nationwide Mutual Insurance Company (hereafter Nationwide). Specifically, Respondent Clay believes it necessary to inform the Court of the outcome of the suit by Justice T. Eric Embry against Blue Cross-Blue Shield of Alabama.

In its Petition Nationwide urges this Court to require the disqualification of Justice Embry from the appellate decision in this case, although the Supreme Court of Alabama refused to do so, because he had brought a civil action in the Circuit Court of Jefferson County (Birmingham) Alabama against Blue Cross-Blue Shield of Alabama seeking punitive damages for the tort of bad faith failure to pay insurance proceeds. Nationwide portrays Justice Embry's suit against Blue Cross-Blue Shield as "his own million dollar bad faith action" and argues:

> The substantial financial interest of Justice Embry is manifest in the obvious fact that the settlement value of Justice Embry's action against Blue Cross-Blue Shield of Alabama, App. C, *infra* 46a-56a, has been enhanced by the two decisions of the Supreme Court of Alabama in *Aetna vs. Lavoie* and the instant case.
>
> Petition p. 11, n.6

Nationwide's Reply Brief reiterates this characterization and claims:

> [T]he settlement value of Justice Embry's bad faith case against Blue Cross-Blue Shield has been greatly enhanced by the Alabama Supreme Court's ruling in this case as well as *Aetna Life Ins. Co. vs. Lavoie,* — So. 2d —, 19 A.B.R. 272 (Ala. Dec. 8, 1984), *appeal docketed,* 53 U.S.L.W. 3759, *probable jurisdiction noted,* 53 U.S.L.W. 3843 (May 28, 1985) (No. 84-1601) [hereinafter *Aetna vs. Lavoie*]. The previous high water mark for bad faith punitive damages in Alabama was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co. vs. Barnes,* 405 So.2d 916, 926 (Ala. 1981). The $3.5 million and $1.25 million punitive damage verdicts affirmed in *Aetna vs. Lavoie* and the present case,

respectively, put Justice Embry's claim in the 'million dollar plus' potential verdict range.[1]

* * *

[1] The facts of Justice Embry's bad faith lawsuit against Blue Cross-Blue Shield were discussed in Justice Embry's deposition taken January 10, 1985. A transcript of that deposition is already on record in this court in *Aetna vs. Lavoie*. *See* Jurisdictional Statement of Aetna Life Ins. Co., App. p. 145a. A copy of Justice Embry's complaint in that case is included in Nationwide's petition, App. C, p. 46a.

Reply Brief p. 1

As pointed out in the preceding footnote, a copy of Justice Embry's complaint against Blue Cross-Blue Shield is included in the Appendix to Nationwide's Petition for Writ of Certiorari at pp. 46a-56a. Omitted from Nationwide's Petition and Reply Brief, however, is any reference to the fact that Justice Embry's suit against Blue Cross-Blue Shield was dismissed with prejudice on April 16, 1985, eleven days after the Supreme Court of Alabama unanimously denied Nationwide's Motion for Withdrawal of Opinion and Suggestion of Disqualification. See Petition, App. B, pp. 29a-30a.

Copies of the Order of Dismissal and Stipulation for Dismissal were first provided to Respondent Clay on September 26, 1985 and they are attached as an Appendix to this Supplemental Brief for the review of the Court. Respondent Clay submits that the terms of the Stipulation for Dismissal demonstrate that Justice Embry's actions of which Nationwide complains were in no way motivated by self-interest. His refusal to disqualify himself was entirely proper, as was the decision of the other justices of the Supreme Court of Alabama not to require his disqualification. Consequently, Respondent Henry Gerrard Clay would once again urge this Court to defer to the

judgment of the Supreme Court of Alabama on this issue, and deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. CV 84-500-447-JDC
T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

(Filed April 16, 1985)

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, [sic] and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the 16th day of April, 1985.

/s/ Jack D. Carl
CIRCUIT JUDGE

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO.: CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

(Filed April 16, 1985)

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a) (1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for and intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the 12th day of April, 1985.

T. ERIC EMBRY

By: /s/ W. Eugene Rutledge
As His Attorney

BLUE CROSS AND BLUE SHIELD OF ALABAMA

By: /s/ William G. Somerville, Jr.
As Its Attorney

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 29th day of August, 1985.

/s/ Douglas L. Cockrell
Register

By: /s/ C. Houtz
Deputy Register